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Re-examining Miller v Miller: a search for rationality and coherence in Australia's illegality defence

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Abstract

While it has long been accepted that a 'confirmed criminal is as much entitled to redress as his most virtuous fellow citizen',¹ the defence of illegality has the potential to entirely divest plaintiffs of private law remedies. In light of the anomalous approach to the illegality defence adopted by the High Court of Australia in *Miller v Miller*, this article considers whether Australia's illegality defence in the general law of torts requires reformulation. In adopting a comparative approach, the article demonstrates that although Australia's duty-based illegality defence is criticised for being unusual and indeed unjust, the discretionary-based approach implemented within the United Kingdom is denounced as 'intolerably uncertain' and the rule-based approach formulated in Canada is condemned for its narrow scope and rigidity. In seeking to propose a future direction for the development of Australia's illegality defence in the context of tort law, this article articulates and deploys a legal coherence framework within which the various formulations of the illegality defence can be appraised.

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Re-examining *Miller v Miller*: A search for rationality and coherence in Australia's illegality defence

Aiden Lerch and Yvonne Apolo*

*While it has long been accepted that a 'confirmed criminal is as much entitled to redress as his most virtuous fellow citizen',¹ the defence of illegality has the potential to entirely divest plaintiffs of private law remedies. In light of the anomalous approach to the illegality defence adopted by the High Court of Australia in *Miller v Miller*, this article considers whether Australia's illegality defence in the general law of torts requires reformulation. In adopting a comparative approach, the article demonstrates that although Australia's duty-based illegality defence is criticised for being unusual and indeed unjust, the discretionary-based approach implemented within the United Kingdom is denounced as 'intolerably uncertain' and the rule-based approach formulated in Canada is condemned for its narrow scope and rigidity. In seeking to propose a future direction for the development of Australia's illegality defence in the context of tort law, this article articulates and deploys a legal coherence framework within which the various formulations of the illegality defence can be appraised.*

I Introduction

The advantages of a clear, consistent and easily applicable principle of law are readily discernible. However, sometimes the considerations behind the law are complex and involve a multifarious range of factors that are not entirely straightforward. In such a situation, judicial discretion is conferred to weigh up these often-conflicting factors, as the law recognises that a simple legal principle is unable to adequately address the intricate situation at hand.

The illegality defence has captivated the attention of courts and scholars ever since its inception as it reflects this very problem.² In the context of tort law, the illegality defence involves a consideration of whether illegal conduct on the part of a plaintiff, at the time that a tort is committed against that plaintiff, should bar an otherwise successful claim for compensatory

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¹ *Olmstead v United States*, 277 US 438, 484 (Brandeis J) (1928).

² As Erbacher states, '[t]he law governing claims founded on illegal conduct has been in a perpetually shambolic state for almost 250 years following Lord Mansfield's sweeping pronouncement ... that a court should not enforce a claim based on an illegal act' in *Holman v Johnson* (1775) 1 Cowp 341, 98 ER 1120; Sharon Erbacher, 'Another Misstep in Negligence and Illegality' (2017) 27 *New Zealand Universities Law Review* 1060, 1060.

damages.³ Determining the effect of a plaintiff's illegality on a claim in tort is a particularly arduous task, as quite unusually, it involves a consideration of both public law and private law rights.⁴ As a result, scholars, courts and judges across the common law world are divided as to the proper application of the illegality defence in the context of tort law.⁵

In Australia, the High Court first considered a defence of illegality in tort law in the 1938 case of *Henwood v Municipal Tramways Trust (SA)*.⁶ Ever since, there has been significant debate over how the defence ought to be conceptualised and the underlying purpose it should endeavour to achieve.⁷ In the course of implementing civil liability reforms, State and Territory parliaments ostensibly intervened in the debate. New South Wales (NSW), South Australia (SA), Queensland (Qld), Tasmania (Tas), the Australian Capital Territory (ACT) and the Northern Territory (NT) have all introduced statutory illegality defences.⁸ These provisions similarly hold that a plaintiff will not be awarded damages if a Court is satisfied that the plaintiff's injury occurred whilst engaged in illegal conduct,⁹ which *contributed materially* to the plaintiff's injury or to the risk of injury.¹⁰ In Qld, ACT, NT and SA the

3 See for example, Justin Tan, 'Illegality as a defence in negligence: Judge Gilbert's formula' (2018) 25 *Torts Law Journal* 49.

4 This is because a court has to strike a balance between upholding the civil right to be compensated for loss in tort law on the one hand, and not allowing plaintiffs to be compensated for their criminal conduct on the other: Andrew Burrows, 'Illegality After *Patel v Mirza*' (2017) 70 *Current Legal Problems* 55, 56.

5 See James Goudkamp, 'The Defence of Joint Illegal Enterprise' (2010) 34 *Melbourne University Law Review* 425, 434–9; Ernest Weinrib, 'Illegality as a Tort Defence' (1976) 26 *University of Toronto Law Journal* 28, 39–54; Beverley McLachlin, 'Weaving Law's Seamless Web: Reflections on the Illegality Defence in Tort Law' in Andrew Dyson et al (eds), *Defences in Tort* (Bloomsbury Publishing, 2015) 207; Lord Jonathan Mance, 'Ex Turpi Causa — When Latin Avoids Liability' (2014) 18 *Edinburgh Law Review* 175; Lord Sumption JSC, 'Reflections on the Law of Illegality' (2012) 20 *Restitution Law Review* 1; Margaret Fordham, 'The Role of Ex Turpi Causa in Tort Law' [1998] *Singapore Journal of Legal Studies* 238; Erbacher, 'Another Misstep in Negligence and Illegality', above n 2; Robert Stevens, 'Contributory Fault — Analogue or Digital?' in Andrew Dyson et al (eds), *Defences in Tort* (Bloomsbury Publishing, 2015) 255; James Goudkamp, 'The End of an Era? Illegality in Private Law in the Supreme Court' (2017) 133 *Law Quarterly Review* 14; Harold Davis, 'The Plaintiff's Illegal Act as a Defense in Actions of Tort' (1905) 18 *Harvard Law Review* 505.

6 (1938) 60 CLR 438, in which it conceptualised the defence as being operative in those cases where the legislature intended 'to disentitle a person doing the prohibited act from complaining of the other party's neglect or default' at 460.

7 See *Smith v Jenkins* (1970) 119 CLR 397; *Progress & Properties Ltd v Craft* (1976) 135 CLR 651; *Jackson v Harrison* (1978) 138 CLR 438; *Gala v Preston* (1991) 172 CLR 243.

8 *Civil Law (Wrongs) Act 2002* (ACT) s 94(1); *Civil Liability Act 2002* (NSW) s 54(1); *Civil Liability Act 2003* (Qld) s 45(1); *Civil Liability Act 1936* (SA) s 43(1); *Civil Liability Act 2002* (Tas) s 6; *Personal Injuries (Liabilities and Damages) Act 2003* (NT) s 10(1).

9 NSW and Tas require the plaintiff to have committed a 'serious offence' (defined as one punishable by imprisonment for 6 months or more); Qld, SA and the ACT require the plaintiff to have committed an indictable offence; NT requires the plaintiff only to have committed an offence that is punishable by imprisonment: *ibid*.

10 Note that the Western Australian statutory defence is entirely different from those proposed by the other states and territories: see *Offenders (Legal Action) 2000* (WA) s 5. In addition, in Victoria s 14G(2) of the *Wrongs Act 1958* (Vic) simply requires courts to consider a plaintiff's illegality when determining whether there has been a breach of duty for the purposes of establishing the tort of negligence.

defence will not apply if a Court is satisfied that the application of the defence would operate harshly and unjustly.¹¹

Rather than clarifying the illegality defence in tort law, these provisions have exacerbated its complexity in two distinct ways. The first pertains to the nature of the test adopted by the legislature in determining the effect of a plaintiff's illegality. The majority of the statutory defences hold that a court is not to award damages if a plaintiff's illegal conduct 'contributed materially' to the plaintiff's injury or to the risk of injury. Since Australian courts had never before used such a formulation of the defence, such a conception has been described as an act of 'legislative experimentation',¹² which is problematically premised upon a complex (and vexed) question of causation.¹³

The second, and perhaps most interesting feature of these statutory defences, is that a gap is left for the illegality defence at common law to continue to apply in certain circumstances. For instance, in Victoria the common law defence is the applicable law;¹⁴ however, in SA the statutory defence does not affect the common law relating to joint illegal enterprises.¹⁵ In NSW, it is accepted that where the plaintiff is the only party who has engaged in illegal conduct, then s 54 of the *Civil Liability Act 2002* (NSW) is the applicable law. However, section 54 leaves room for the common law defence to apply where the conduct of the defendant that caused the plaintiff's injury or death constitutes *any kind* of offence.¹⁶ What this means is that, where both the plaintiff and the defendant have committed an illegal act at the time of, or following, the commission of the tort, and in the case of NSW, the defendant's illegal conduct was also the cause of the plaintiff's injury, then the common law illegality defence remains the applicable law. Since the common law defence of illegality has not been ousted by civil liability legislation,¹⁷ and yet is often overlooked by courts, practitioners and academics alike, it is the common law approach to the defence of illegality that this article is concerned with.¹⁸

11 *Civil Liability Act 2003* (Qld) s 45(2); *Civil Law (Wrongs) Act 2002* (ACT) s 94(2); *Personal Injuries (Liabilities and Damages) Act 2003* (NT) s 10(2); *Civil Liability Act 1936* (SA) s 43(2). No explanation is given as to when such harsh or unjust circumstances will arise.

12 James Goudkamp, 'Self Defence and Illegality under the Civil Liability Act 2002 (NSW)' (2010) 18 *Torts Law Journal* 61, 72.

13 Furthermore, the 'contributed materially' requirement draws its historical underpinnings from the 'material contribution' exception to the usual 'but for' test of causation. This exception has traditionally been utilised by *plaintiffs* in establishing the causation element in negligence where their injury was as a result of cumulative causes: see *Bonnington Castings Ltd v Wardlaw* [1956] 1 All ER 615, 618 (Lord Reid). Thus, its incorporation in the illegality defence context now means that it is being used for the benefit of defendants, something that was never contemplated by the common law.

14 See *Wrongs Act 1958* (Vic) s 14G(2).

15 *Civil Liability Act 1936* (SA) s 43(4)(c).

16 *Civil Liability Act 2002* (NSW) s 54(2). See also *Civil Liability Act 2002* (NSW) s 3A(1), which explicitly maintains the applicability of common law defences.

17 Its continued relevance is heightened by the observation that '[t]he illegality defence's main area of operation in practice concerns cases in which the plaintiff was injured while engaged in a joint illegal enterprise with the defendant': Carolyn Sappideen, Prue Vines and Penelope Watson, *Torts: Commentary and Materials* (Thomson Reuters, 12th ed, 2016) 716.

18 In addition, in NSW the common law illegality defence will also be relevant to a negligence action that occurs while driving a motor vehicle, as the *Civil Liability Act 2002* (NSW) does not apply: *Civil Liability Act 2002* (NSW) s 3B(d)–(f). Motor accident claims are also

The High Court most recently considered the common law defence of illegality in *Miller v Miller*,¹⁹ where the court endorsed an entirely different conception from that introduced by the legislature. Rather than recognising illegality as a full defence, as it does in all the other laws of obligation,²⁰ the High Court held that a plaintiff's illegality operates as a salient feature that ought to be taken into account when determining whether a duty of care is owed in negligence.²¹ As a result, this 'defence' is only applicable in the tort of negligence.²² According to the High Court's formulation, in order to maintain legal coherence the illegality defence must prevent a duty of care from arising in all negligence claims that would undermine or stultify the purpose of the statute governing the plaintiff's *criminal conduct*.²³ Interestingly, it is for the court to determine what the 'purpose' of the statute is and whether the plaintiff's claim will undermine it.²⁴

While the statutory illegality defences have attracted scholarly critique,²⁵ the common law illegality defence has been left relatively unexplored within Australian tort law scholarship. In particular, there is an absence of scholarship specifically endorsing and propounding arguments in support of the approach taken by the High Court in *Miller v Miller*. Furthermore, limited attention has been devoted to scrutinising the reasoning of the court.²⁶ In light of both the anomalous approach adopted in this case and the comparative lack of academic attention it has attracted, there seems to be ample reason to re-examine the High Court's formulation of the defence. This view is further strengthened when considering the conceptions of the illegality defence espoused in comparable common law jurisdictions. In the United Kingdom ('UK') for instance, a majority of the UK Supreme Court ('UKSC') settled the

generally excluded from the scope of civil liability legislation in Queensland (*Civil Liability Act 2003* (Qld) s 5) and the Northern Territory (*Personal Injuries (Liabilities and Damages) Act 2003* (NT) s 4). Indeed, most of the cases that give rise to a defence of joint illegality involve motor vehicles.

19 (2011) 242 CLR 446.

20 That is, contract law, the law of trusts, tort law and unjust enrichment: see generally Andrew Burrows, *Understanding the Law of Obligations* (Hart Publishing, 2000).

21 *Miller v Miller* (2011) 242 CLR 446, 454 [13]. The illegality defence in Australia at common law can only be used as a defence to the tort of negligence, as there is no duty of care requirement in intentional torts. The High Court however, did not give any justification for such reasoning.

22 *Ibid.* This was confirmed in *Croucher v Cachia* (2016) 95 NSWLR 117, 126 [39] (Leeming JA).

23 *Miller v Miller* (2011) 242 CLR 446, 454–5 [16], [101] 481–2. This is a similar approach to that which the court adopted in relation to the defence of unilateral illegality in *Henwood v Municipal Tramways Trust (SA)* (1938) 60 CLR 438, described at above n 6.

24 *Ibid.*

25 See generally James Goudkamp, 'A Revival of the Doctrine of Attainder? The statutory Illegality Defences to Liability in Tort' (2007) 29 *Sydney Law Review* 445; Po Jen Yap, 'Rethinking the Illegality Defence in Tort Law' (2010) 18 *Tort Law Review* 52; Goudkamp, 'Self Defence and Illegality under the Civil Liability Act 2002 (NSW)', above n 12, 61.

26 Although see Fleming's scathing criticism of such an approach in John Fleming, *The Law of Torts* (Law Book Co, 1957) 139, 279–80. See also the critiques provided in: McLachlin, above n 5; Erbacher, 'Another Misstep in Negligence and Illegality', above n 2; Sharon Erbacher, *Negligence and Illegality* (Bloomsbury Publishing PLC, 2017) 128–9.

debate²⁷ over the illegality defence in the relatively recent case of *Patel v Mirza*.²⁸ Interestingly, the conception of the defence that the court adopted is in complete conflict with Australia's approach in tort law.²⁹

This development, combined with the complexity that has traditionally surrounded this area of law, leaves Australia's common law illegality defence in a precarious position. In pursuit of greater stability and reason, this article will critically evaluate the Australian conception of the illegality defence deployed in the context of tort law and will contrast this approach with formulations adopted in other common law jurisdictions. This article ultimately seeks to shed new light on the future direction of the defence by proposing an alternative formulation that can better achieve the purported purpose of the illegality defence in tort.

As a necessary first step in achieving this aim, Part II of this article will engage with scholarship concerning the illegality defence in order to uncover the rationale that most persuasively accounts for the recognition of such a defence in the context of tort law. As the proceeding paragraphs have alluded to, the preservation of legal coherence (particularly between actions in negligence and the relevant criminal law regulating the plaintiff's conduct) is the most cited and defensible justification for the defence. Nevertheless, legal coherence is quite an obscure and ambiguous objective. As a result, Part II will unpack the meaning of legal coherence, before introducing a unique framework for a legal coherence analysis. It is this framework that will then be deployed throughout the remainder of the article to appraise the various forms of the illegality defence recognised at common law.

Specifically, in Part III attention will be devoted to examining the Australian conception of the illegality defence in tort law, as articulated by the High Court in *Miller v Miller*. In Part IV, this Australian methodology will be contrasted with the distinct approaches adopted in Canada and the UK.³⁰ Following this comparative analysis, a preliminary conclusion will be reached regarding the conception of the illegality defence that appears to most satisfactorily promote legal coherence.

In Part V, this preliminary conclusion will be tested via the use of a case study designed to assess the practical application of each conception of the illegality defence in the context of tort law.³¹ This article will then conclude with a suggestion for the future direction of the defence in Australia.

27 See *Gray v Thames Trains Ltd* [2009] 1 AC 1339; *Hounga v Allen* [2014] 1 WLR 2889; *Les Laboratoires Servier v Apotex Inc* [2015] AC 430; *Bilta (UK) Ltd (in liq) v Nazir* [No 2] [2016] AC 1.

28 [2017] AC 467.

29 Interestingly, however, Lord Toulson JSC (writing for the majority) drew on Australia's conception of the illegality defence in equity in *Nelson v Nelson* (1995) 184 CLR 538 to highlight that a discretionary approach should be used when applying the defence: *Patel v Mirza* [2017] AC 467, 486–8 [50]–[54].

30 These jurisdictions have been selected not only for the reason that they each represent comparable common law systems, but also because their respective conceptions of the illegality defence have significant scholarly support.

31 This method is well known in the context of feminist legal scholarship: Nancy Naples, *Feminism and Method: Ethnography, Discourse Analysis, and Activist Research* (Routledge, 2013) 24, 261. However, it has also been used by tort law scholars: see James Goudkamp

II The importance of legal coherence: An analytical framework

Central to assessing the validity of a law is to consider the purpose for which it was created.³² It follows that a principled appraisal of the common law illegality defence will only be effective if its purpose is properly understood. To that end, this Part will be structured into three key sections. The first section will explore the underlying rationale for the recognition of the illegality defence in the context of tort law. The second section will engage with relevant scholarship in order to advance a sophisticated understanding of this rationale: namely, the pursuit of legal coherence. On the foundations of a nuanced appreciation of the distinction between legal coherence, on the one hand, and legal consistency on the other, the third section will construct and articulate a framework for a legal coherence analysis of the illegality defence that will be used throughout the remainder of the article.

A Uncovering the rationale for the defence of illegality

When the High Court first considered the defence of illegality in *Henwood v Municipal Tramways Trust (SA)*, the effect of a plaintiff's illegality was discussed not as a separate and distinct defence, but in the context of a claim for contributory negligence.³³ Nevertheless, when apportionment legislation was subsequently introduced,³⁴ the High Court in *Smith v Jenkins* used English authority to hold that illegality on the part of a plaintiff was a *complete defence*.³⁵ Ever since this severance, there has been debate regarding the underlying rationale for the recognition of such a defence in the law of torts. Discernible within the relevant academic and judicial commentary are four common justifications; each of which is explored below.

1 Deterrence

One of the first arguments advanced for the existence of the defence of illegality was premised on the notion of deterrence. In *Godbolt v Fittock*,³⁶ the NSW Supreme Court held that by preventing a plaintiff from being compensated due to their illegal conduct, plaintiffs would generally be deterred from engaging in criminal behaviour.³⁷ Unsurprisingly, however, many commentators have rejected this rationale for the fundamental reason that it is highly unlikely that a person who is considering whether to commit

and Lorenz Mayr, 'The Doctrine of Illegality and Interference with Chattels' in Andrew Dyson et al (eds), *Defences in Tort* (Hart Publishing, 2015) 223. This further justifies the decision to use such a method.

32 Joseph Raz, 'Kelsen's Theory of the Basic Norm' (1974) 19 *American Journal of Jurisprudence* 94, 99.

33 When it was once a complete defence.

34 See, eg *Law Reform (Miscellaneous Provisions) Act 1965* (NSW) s 9(1).

35 *Smith v Jenkins* (1970) 119 CLR 397, 399–403 (Kitto J).

36 [1964] NSW 22.

37 Ibid 29. See also *Thackwell v Barclays Bank plc* [1986] 1 All ER 676, 689; *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1, 35.

a criminal offence, will be thinking about the availability of compensation in the law of tort.³⁸ As explained by Goudkamp:

If the threat of criminal penalties fails to deter a plaintiff from committing an offence, it seems quite fanciful to think that the *potential* loss of a remedy in tort that *may* have otherwise been enjoyed *in the event of* sustaining injury while committing the offence will do so.³⁹

2 Punishment

Some courts⁴⁰ and scholars⁴¹ have argued that the illegality defence can be justified according to the logic that it punishes the plaintiff. Again, however, the majority of scholarship within this field has rejected this policy basis.⁴² There are three primary reasons argued for its rejection. Firstly, McLachlin opines that punishment of the *plaintiff* is not a purpose of tort law and therefore such a policy argument cannot be justified within it.⁴³ Secondly, Virgo highlights that the defence may apply even if the plaintiff has already been punished by the criminal law. It therefore cannot be justified as a punishment because doing so would subject plaintiffs to an inexcusable double punishment.⁴⁴ Thirdly, Goudkamp has identified that even if a plaintiff deserves punishment, the defence of illegality is an inappropriate way of delivering it. This is because the defence acts to totally bar a plaintiff's claim. As a result, the plaintiff's punishment will be commensurate to the amount that they were entitled to claim, which is ultimately determined by the measure of loss the plaintiff has suffered due to the defendant's tort.⁴⁵ This form of punishment is, therefore, irrational and disproportionate as it is determined by the level of injury caused by the tort rather than by a measured decision based on the plaintiff's relative culpability.⁴⁶

38 McLachlin, above n 5, 213; Goudkamp, 'Self Defence and Illegality under the Civil Liability Act 2002 (NSW)', above n 12, 68; W J Ford, 'Tort and Illegality: The *Ex Turpi Causa* Defence in Negligence Law' (1977) 11 *Melbourne University Law Review* 32, 183; Yap, above n 25, 64; Graham Virgo, 'Illegality's Role in the Law of Torts' in Matthew Dyson (ed), *Unravelling Tort and Crime* (Cambridge University Press, 2014) 174, 187.

39 Goudkamp, 'A Revival of the Doctrine of Attainder?', above n 25, 452.

40 *Tinsley v Milligan* [1992] Ch 310, 334.

41 Allen Linden, *Canadian Tort Law* (Butterworths, 5th ed, 1993) 473.

42 McLachlin, above n 5, 212; Goudkamp, 'Self Defence and Illegality under the Civil Liability Act 2002 (NSW)', above n 12, 67–8; Ford, above n 38, 185; Virgo, 'Illegality's Role in the Law of Torts', above n 38, 188; D Gibson, 'Torts: Illegality of Plaintiff's Conduct as a Defence' (1969) 47 *Canadian Bar Review* 89, 91.

43 McLachlin, above n 5, 212. It is also worth noting that whilst exemplary damages may be awarded in tort law proceedings 'to punish the defendant' (*Uren v John Fairfax & Sons Ltd* (1966) 117 CLR 118, 149), the High Court of Australia has described this remedy as 'exceptional' (*Gray v Motor Accident Commission* (1998) 196 CLR 1, 9 [20]). Moreover, the High Court considers the fact that the defendant has also been punished by the criminal law as a factor that may exclude the award of exemplary damages, as 'considerations of double punishment would otherwise arise' (*Gray v Motor Accident Commission* (1998) 196 CLR 1, 14 [43]). Thus, notwithstanding the phenomenon of exemplary damages, punishment is rarely advanced as a valid purpose of tort law.

44 Virgo, 'Illegality's Role in the Law of Torts', above n 38, 188.

45 James Goudkamp, 'The Defence of Joint Illegal Enterprise' (2010) 34 *Melbourne University Law Review* 425, 442; Erbacher, *Negligence and Illegality*, above n 26, 39–42.

46 *Ibid.*

3 Preventing wrongful profiting

A fundamental principle of the common law is that a court must never allow a party to profit from his or her own wrong.⁴⁷ A line of reasoning has therefore based the rationale for the illegality defence on preventing plaintiffs from profiting from their illegal actions.⁴⁸ Yet, this rationale has also been rejected by a majority of scholars in the field for the primary reason that tort law generally compensates only for loss.⁴⁹ Therefore, plaintiffs will generally never profit from their illegal conduct by making a claim in tort. As pointed out by McLachlin and Glofcheski however, this is subject to two exceptions: where a plaintiff seeks exemplary damages⁵⁰ or is seeking compensation for a loss of illegal earnings (a loss of income from being unable to commit further crimes).⁵¹ Thus, other than in these two circumstances, this policy reason is widely unsupported in the context of tort law.

4 Coherence in the law

Legal coherence, first articulated and endorsed by Weinrib,⁵² is widely accepted as the soundest justification for the existence of the illegality defence in tort law in the Australian,⁵³ Canadian⁵⁴ and English⁵⁵ jurisdictions. In Canada, for instance, McLachlin J (as she then was) cited Weinrib's work in the landmark judgment of *Hall v Hebert*, where she described the coherence rationale in the following terms:⁵⁶

[T]he law must aspire to be a unified institution, the parts of which — contract, tort the criminal law — must be in essential harmony. For the courts to punish conduct with one hand while rewarding it with the other would be 'to create an intolerable fissure in the law's conceptually seamless web'.⁵⁷

This rationale holds that the illegality defence will be justified in tort law where the ordinary principles of tort would lead to an outcome that is incoherent with other bodies of law, such that it would be 'harmful to the integrity of the legal system'.⁵⁸ An example of such incoherence is where a

47 See *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147, 158.

48 See *Meah v McCremer* [No 2] [1986] 1 All ER 943, 951; Mark Law and Rebecca Ong, 'He who comes to Equity need not do so with clean hands?: illegality and resulting trusts after *Patel v Mirza*, what should the approach be?' (2017) 23 *Trusts and Trustees* 880, 889–90.

49 McLachlin, above n 5, 213; Goudkamp, 'Self Defence and Illegality under the Civil Liability Act 2002 (NSW)', above n 12, 68; Yap, above n 25, 64; Virgo, 'Illegality's Role in the Law of Torts', above n 38, 185–7; Weinrib, 'Illegality as a Tort Law Defence', above n 5, 40–3; Erbacher, above n 26, 36–9.

50 As they are not compensatory in nature: McLachlin, above n 5, 213; Richard Glofcheski, 'Plaintiff's Illegality as a Bar to Recovery of Personal Injury Damages' (1999) 19 *Legal Studies* 6, 17–18.

51 In these situations, the plaintiff will be said to be using tort to profit from their criminal actions: *Ibid.*

52 See generally Weinrib, 'Illegality as a Tort Law Defence', above n 5.

53 *Miller v Miller* (2011) 242 CLR 446, 454 [15].

54 *Hall v Hebert* [1993] 2 SCR 159, 176.

55 *Patel v Mirza* [2017] AC 467, 499 [99].

56 [1993] 2 SCR 159, 176.

57 *Ibid.*

58 *Hall v Hebert* [1993] 2 SCR 159, 169; *Patel v Mirza* [2017] AC 467, 490 [61], 494 [77], 499 [100]–[101].

plaintiff uses the law of torts to deflect a criminal penalty.⁵⁹ Various scholars have argued that coherence in the law is necessary because it is essential in justifying law's normative force to those who are subject to it.⁶⁰ As McLachlin explains:

Coherence is essential to justification. When a justification lacks coherence, the legal relationships it orders become arbitrary. *By coherence I mean more than mere consistency.* A set of rules are mutually consistent if they do not contradict one another. By contrast, coherence 'is the property of a set of propositions which, taken together, "make sense" in its entirety'.⁶¹

The illegality defence therefore operates as a principle that prevents tort law from coming into conflict with other areas of law (in particular criminal law), thus maintaining the integrity of tort law's authority to coerce.

While legal coherence is widely accepted as underpinning the defence of illegality, there is very little scrutiny of this justification. Both McLachlin and Weinrib, however, are critical of the legal coherence rationale being used too broadly. They acknowledge the different objectives of criminal law and tort law and state that the coherence principle does not necessarily mean that the principles of the criminal law should be given disproportionate attention, such that they otherwise forsake those of tort.⁶²

Despite McLachlin and Weinrib's attenuated support for the coherence rationale, current literature has seemingly failed to consider their concerns. Moreover, existing tort law scholarship has largely failed to articulate the 'type' of legal coherence that ought to be maintained. Accordingly, the next section of this article will engage with legal coherence literature to arrive at a well-reasoned and nuanced understanding of the form of coherence that could effectively guide the application of the illegality defence in tort law.

B Understanding 'legal coherence'

Literature on the theory of legal coherence is extensive.⁶³ In the context of the common law world, MacCormick influentially described the role of coherence

59 Weinrib gives a useful example ('Illegality as a Tort Law Defence', above n 5, 50–1):

Two burglars steal into a house with criminal intent. As a result of burglar A's careless failure to de-activate the alarm system they are both caught, convicted in a criminal prosecution, and sentenced to pay a fine. Burglar B then sues A in tort to recover the amount of the fine, alleging that A should have foreseen the harmful consequences that would result from his negligently performing his part in the burglary ... Conviction and sentencing by a criminal court is the law's method of ascribing to B the responsibility for his action ... It would make no sense at all if B were able to utilize tort law's mechanism of shifting losses in order to avoid the very consequences which criminal law has imposed upon him for his intentionally culpable conduct.

60 Ibid, 50–4; Erbacher, above n 2, 1063; McLachlin, above n 5, 218–20; Goudkamp, 'Self Defence and Illegality under the Civil Liability Act 2002 (NSW)', above n 12, 68–9.

61 McLachlin, above n 5, 219 (emphasis added).

62 Ibid 220; Weinrib, 'Illegality as a Tort Law Defence', above n 5, 44.

63 See generally Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986); Neil MacCormick, *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (Clarendon Press, 1984); Aleksander Peczenik, *On Law and Reason* (Springer, 1989); Jack Balkin, 'Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence' (1993) 103 *Yale Law Journal* 105; Amalia Amaya, *The Tapestry of Reason: An Inquiry into the Nature of Coherence and its Role in Legal Argument* (Hart Publishing, 2015).

as ‘second-order justification’; that is, justification required in order for judges to choose an appropriate proposition of law in hard cases.⁶⁴ Coherence, therefore, involves ‘the multitudinous rules of a legal system ...“mak[ing] sense” when taken together’.⁶⁵ In a similar vein, Balkin describes the role of coherence in law as a form of normative coherence, or justification, explaining that ‘values and judgments are normatively coherent if they employ distinctions and similarities that are principled and reasonable as opposed to those which are arbitrary and unreasonable.’⁶⁶ As such, in the context of the illegality defence, the pursuit of coherence serves to both shape and justify difficult judicial choices concerning the circumstances in which an unlawful act will prevent an individual from complaining of an injury wrongfully inflicted by another.

An important consequence of these influential accounts of legal coherence, is that the concept of coherence must be distinguished from that of consistency.⁶⁷ That is, coherence is not achieved simply by making legal principles identical throughout the various areas of law. This is because, as MacCormick has observed, a set of principles that do not contradict each other can still involve the pursuit of no intelligible value.⁶⁸ Thus, a legal system can still be described as coherent where the many areas of the common law, such as tort, contract, and trust are underpinned by a variety of disparate policies and principles that aim to achieve differing goals, and which subsequently lead to differing outcomes.

A second valuable point that is derived from legal coherence scholarship is that a legal system will not be coherent if it emanates from a single all-applicable principle. Rather, Balkin explains that the law will be coherent if it can be viewed as emanating from a *set of* principles and policies.⁶⁹ He further argues that ‘these principles and policies do not have to stem from a single master principle or policy, nor do they have to be mutually interdependent so that if one goes they all go’.⁷⁰ In the context of private law, therefore, it cannot be said that the law of obligations must stem from a single principle. To be legally and logically coherent, each branch of law must be founded upon a unique set of principles and policies that shape, orient and inform the body of law within it. Consequently, as Weinrib recognised,⁷¹ a ‘doctrinal transplantation’, in the sense of taking a principle from one area of law and replacing it within another, would lead to incoherence. This is because such a transplantation is premised upon there being a single all-applicable principle across each doctrine, and it therefore ignores the often-conflicting principles and policies that have been developed in each area of the common law over an extensive period of time. As an example, Australian and English courts have ensured that the assessment of damages in contract and tort are

64 Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press, 1994) 100.

65 Ibid 152.

66 Balkin, above n 63, 114.

67 See also MacCormick, *Legal Right and Social Democracy*, above n 63, 38.

68 Ibid 39. See also Amaya, above n 63, 13.

69 Balkin, above n 63, 116–17.

70 Ibid.

71 See Weinrib, ‘Illegality as a Tort Law Defence’, above n 5, 44.

based on distinct tests,⁷² reflecting the divergent ways of conceiving loss in each area of law.⁷³ It would be irrational to make the tests identical in the mere pursuit of legal coherence.

Finally, scholars have recognised that legal coherence may need to be attenuated in order to achieve some other end, particularly where that end calls for progressive legal development. As explained by Amaya:

Coherentist inference in law may not only be objected to on the grounds of vicious circularity, but it also seems to be unduly conservative. Coherence theories of legal justification have a built-in conservative tendency insofar as they make the justification of new elements depend on their coherence with a pre-existing structure. This conservative trend is an obstacle to normative change and legal innovation and, in morally deficient legal systems, it leads to committing new injustices in the name of coherence with a settled body of law.⁷⁴

Amaya's warning that a strict compliance with legal coherence will lead to conservative outcomes has also been echoed by Goudkamp and Mayr in the specific context of tort law, who argue that the ruthless pursuit of coherence may result in important values being unjustifiably sacrificed.⁷⁵ Such observations must therefore be kept in mind when making a decision in the name of legal coherence.

Four principled conclusions can be derived from this discussion, which cumulatively enrich our understanding of the necessary distinction between legal coherence, on the one hand, and mere legal consistency on the other. Firstly, in order to arrive at a legally coherent outcome, the reasoning undertaken in the application of the illegality defence must transcend 'doctrinal transplantation' by valuing the distinctive policies and principles that underpin each facet of the common law.⁷⁶ Secondly, in the course of such reasoning, substantive attention should be devoted to the principles and policies of the area of law in which the decision is to be made before the principles of other areas of law are considered.⁷⁷ Thirdly, legal coherence theory allows for the various areas of law to reach different outcomes on the basis of their unique doctrines and policies, so long as such outcomes are principled and reasonable, as opposed to arbitrary and unreasonable.⁷⁸ Finally, a strict implementation of legal coherence, in the sense of making all outcomes consistent, can risk unduly impeding legal progress and generating circular outcomes that lead to injustice.⁷⁹ The rigid pursuit of legal coherence

⁷² See *Robinson v Harman* (1848) 1 Ex Rep 850, 855 (contract) and *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39 (tort).

⁷³ See *Astley v Austrust Ltd* (1999) 197 CLR 1 where the High Court examined the reasons for the differing tests.

⁷⁴ Amaya, above n 63, 474.

⁷⁵ Goudkamp and Mayr, above n 31, 243.

⁷⁶ McCormick, *Legal Right and Social Democracy*, above n 63, 39; Amaya, above n 63, 13.

⁷⁷ This is because it cannot be said that all of the areas of the common law stem from one principle: Balkin, above n 63, 114–17.

⁷⁸ For example, it was in response to the fact that contract law did not provide a remedy to the plaintiff in *Donoghue v Stevenson* [1932] UKHL 100 that the tort of negligence was expanded. While it could be suggested that tort and contract exist in a state of conflict, it would be unreasonable to suggest that because the law of contract did not recognise any remedy, the law of torts should also deny a remedy.

⁷⁹ Amaya, above n 63, 474; Goudkamp and Mayr, above n 31, 243.

should therefore be avoided, so as to not undermine the central logic of the coherence rationale: to justify law's coercive force by rendering rational and reasonable outcomes.

The foregoing analysis can beneficially enhance the present debate over the proper conception of the illegality defence in tort.

C The analytical legal coherence framework: in brief

Although legal coherence is widely accepted as the primary justification for the illegality defence in tort, its meaning and parameters have been relatively unexplored by Australian tort law scholars. Based on the foregoing analysis of the legal coherence rationale, this article proposes the following framework for the analysis, development and application of the illegality defence in tort:

- (i) The analysis that informs whether the defence should be applied must value the distinctive principles and policies that underpin each area of the common law;
- (ii) The principles and policies of tort law must be given considerable weight, given that this is the area of law in which the claim has proceeded;
- (iii) The application of the defence to prevent a claim in tort must be reasonable and intelligible, rather than arbitrary and unreasonable; and
- (iv) A strict adoption of legal coherence in pursuit of doctrinal consistency should be avoided.

It is our contention that the form of the defence that most satisfactorily adheres to the mandates of this framework will be better able to advance the purported purpose of the illegality defence in tort. With this analytical framework in mind, the remainder of the article will now critically examine the conceptions of the illegality defence in tort law in Australia, Canada and the UK.

III Australia's conception of the illegality defence: Examining *Miller v Miller*

As stated in Part I, in the leading case of *Miller v Miller*⁸⁰ the High Court of Australia formulated and deployed a conception of the illegality defence in tort, which was entirely different from that implemented by the legislature.⁸¹ In light of the limited scholarly attention received by the decision, this Part of the article will first examine the reasoning and approach of the High Court, before deploying the analytical legal coherence framework to appraise the extent to which the Australian formulation of the illegality defence aligns with its underlying rationale.

A The facts and decision of *Miller v Miller*

On 17 May 1998, the plaintiff, 16-year-old Danelle Miller, her older sister and younger cousin were attempting to make their way home from a nightclub.

⁸⁰ (2011) 242 CLR 446.

⁸¹ Since the claim was originally brought in Western Australia, the relevant legislative provision is the *Offenders (Legal Action) Act 2000* (WA) s 5.

Since they had missed the last train and were unable to pay for a taxi, they decided to steal a car. As they were leaving the car park, the defendant, a 27-year-old relative named Maurin, asked the women if he could drive the stolen vehicle. Danelle agreed. Following this, five of the defendant's friends climbed into the vehicle, consequently overloading the sedan. On the way home, Maurin initially drove sensibly until he then began to speed and drive through red lights. Danelle asked him on numerous occasions to slow down and then to stop and let her out. Maurin refused and kept driving. Shortly after, he lost control of the car and it struck a kerb. Danelle was rendered tetraplegic. She sued in negligence, alleging that Maurin's negligent driving caused her injury. Counsel for Maurin argued that Danelle and Maurin entered into a joint criminal enterprise to use a car without the consent of the owner, contrary to s 371A of the *Criminal Code Act Compilation Act 1913* (WA). Therefore, because both Danelle and Maurin were allegedly acting illegally,⁸² it was argued that the illegality defence at common law applied to defeat Danelle's claim.

The High Court⁸³ ultimately found that Danelle had withdrawn from the joint criminal enterprise and was not acting illegally at the time of the tort. As a result, the illegality defence did not apply.⁸⁴ However, the court then went on to discuss whether the defence would have applied if Danelle had not withdrawn from the enterprise. In this way, the High Court's analysis of the illegality defence, while influential, is strictly obiter dicta.⁸⁵

Within its judgment, the court firstly identified that the primary rationale for the illegality defence is to preserve the coherence of the legal system.⁸⁶ Armed with this understanding, it then propounded the test for the illegality defence in tort law in the following terms:

Ultimately, the question is: would it be incongruous for the law to proscribe the plaintiff's conduct and yet allow recovery in negligence for damage suffered in the

82 It is to be remembered here that the illegality defence under the *Civil Liability Acts* will not apply where both the plaintiff and defendant have acted illegally before, during or after the commission of the tort: see eg, *Civil Liability Act 2002* (NSW) s 54(2). The Western Australian statutory illegality defence under the *Offenders (Legal Action) Act 2000* (WA) is different however, in that s 5(2)(b) provides that the defence will not apply where the injury suffered by the plaintiff arises from circumstances which were entirely separate from those to which the offender was exposed by reason of being engaged in criminal conduct, and to which the offender was exposed in common with other persons who were not engaged in criminal conduct.

83 On appeal from the Western Australian Court of Appeal, which allowed an appeal by the defendant and entered a verdict in his favour: *Miller v Miller* (2009) 54 MVR 367.

84 *Miller v Miller* (2011) 242 CLR 446, 453 [9] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

85 Such an observation is significant because if the defence was to come before a future High Court, it would not be bound by the decision in *Miller v Miller*. This does not, however, undermine the utility of this critical examination because lower courts are bound to apply all considered obiter dicta of the High Court: see *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 150–1 [134], 159 [158]. Lower courts have therefore applied the obiter dicta in *Captain v Wosomo* [2018] 1 Qd R 222; *Quine v Keerasawat* (2014) 87 SR (WA) 17; *Character Design Pty Ltd v Kohlen [No 2]* [2013] WASC 340 (6 September 2013). Furthermore, the next time the High Court considers the defence it will likely consider the approach in *Miller v Miller* as a viable conception.

86 *Miller v Miller* (2011) 242 CLR 446, 454 [15].

course, or as a result, of that unlawful conduct?... It will be by reference to the relevant statute, and identification of its purposes, that any incongruity, contrariety or lack of coherence denying the existence of a duty of care will be found.⁸⁷

As such, in *Miller v Miller* the High Court followed the approach it had previously taken in the context of ‘unilateral illegality’ in *Henwood v Municipal Tramways Trust (SA)*,⁸⁸ holding that the illegality defence will prevent a duty of care in a negligence claim from arising if erecting that duty would stultify the purpose of the statute governing the plaintiff’s criminal conduct.⁸⁹ The ensuing test therefore involves two elements: firstly ascertaining the purpose of the statute that the plaintiff has contravened, and secondly determining whether upholding a duty of care in tort law would undermine that purpose. It is this test, and its application by the High Court, that will now be examined.

B A critical examination of Australia’s duty-based approach

1 The basis of the test

In determining the test to apply when considering a plaintiff’s illegality in tort, the High Court firstly reasoned that because legal coherence is the ‘central’ rationale for the defence, ‘the principles applied in relation to the tort of negligence must be congruent with those applied in other areas of the civil law (most notably contract and trusts)’.⁹⁰ As such, the court simply took the illegality test that is applied in contracts and trusts, and placed it in the context of illegality in torts, stating:

It will be by reference to the relevant statute, and identification of its purposes, that any incongruity, contrariety or lack of coherence denying the existence of a duty of care will be found... It is the same as the path that has been taken in relation to illegality in contract and trusts ...⁹¹

The High Court’s justification for doing this is related to the fact that it assessed Danelle’s illegality as a matter relevant to the duty of care inquiry. From the outset, it should be noted that it is far from clear as to why a plaintiff’s illegality ought to be examined through the lens of duty of care. The High Court provides no explanation to this effect. Yet, in choosing to focus on the concept of duty the court was conscious of the principles espoused in previously decided cases, such as *Sullivan v Moody*,⁹² which warn against the imposition of a duty of care in negligence where this would cut across other common law and statutory responsibilities, or otherwise invite incoherence

⁸⁷ Ibid 454–5 [16], 473 [74].

⁸⁸ (1938) 60 CLR 438. As a result, this leading High Court judgment appears to have obliterated the distinction between unilateral and joint illegality for the purpose of the defence in the general law of torts.

⁸⁹ *Miller v Miller* (2011) 242 CLR 446, 481–2 [101].

⁹⁰ Ibid.

⁹¹ As was said by the majority: ibid 473 [74].

⁹² (2001) 207 CLR 562, 581. See also *Tame v New South Wales* (2002) 211 CLR 317; *CAL (No 14) Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390; *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498; *Hunter and New England Local Health District v McKenna* (2014) 253 CLR 270.

between areas of law.⁹³ As a result, the majority held that when the defence of illegality is raised in tort, it should be assessed with respect to the equivalent tests used across the laws of obligation, irrespective of the differing values and policies across each area of law.⁹⁴

There is, however, a central difficulty with this reasoning. Its effect is to take the illegality defence from the law of contract,⁹⁵ with all its distinctive policies, and place it into the law of tort without any consideration of the core values and policies of tort. The defence of illegality in contract is justifiably premised upon the rationale that one should not be able to profit from criminal actions.⁹⁶ However, as was argued in Part II, such a rationale plays a very limited role in the context of tort law due to the fact that damages in tort generally seek to *compensate* plaintiffs for their loss.⁹⁷ Therefore, a defence of illegality that only narrowly examines the purpose of the statute in question, without drawing a distinction between illegal profits and justified compensation for loss associated with personal injury or property damage, will arbitrarily deny justified compensation and subsequently stultify a central purpose of tort law.⁹⁸ Thus, whereas the High Court explicitly deployed the language of legal coherence when formulating its illegality defence in tort, it is arguable that the foundations of its reasoning are underpinned by a search for legal consistency.

2 The test, the reasoning and the outcome

Applying its ‘statutory purpose’ assessment, the court reasoned that had Danelle not withdrawn from the joint criminal enterprise, the illegality defence would have applied and she would have been denied compensation for her tetraplegia. Two complications with this reasoning will now be considered.

(a) *Element 1: Statutory purpose as an act of judicial legislation*

At the heart of the High Court’s approach is a search for an implied legislative intention in a criminal statute to deny a plaintiff who commits such a crime from being owed a duty of care in the tort of negligence. The complication

93 The High Court explicitly made reference to the decision in *Sullivan v Moody: Miller v Miller* (2011) 242 CLR 446, 454 [15]. For a critical analysis of this principle, however, see John Fleming, ‘Tort in a Contractual Matrix’ (1995) 3 *Tort Law Review* 12, 24; Jane Stapleton, ‘Duty of care factors: a selection from the judicial menus’ in Peter Cane and Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (Clarendon Press, 1998) 59, 71–2; James Goudkamp, *Tort Law Defences* (Hart Publishing, 2013) 201–2.

94 *Miller v Miller* (2011) 242 CLR 446, 482 [102].

95 The illegality defence in trusts is also based on that in contract because the underlying policy for the tests are generally similar: *Nelson v Nelson* (1995) 184 CLR 538.

96 Weinrib, ‘Illegality as a Tort Law Defence’, above n 5, 40; Francis Rose, ‘Reconsidering Illegality’ (1996) 10 *Journal of Contract Law* 271, 274; Sandra Booyesen, ‘Contractual Illegality and Flexibility — A Rose by Any Other Name’ (2015) 32 *Journal of Contract Law* 170, 174–5. It therefore makes sense that in contract, the test for illegality looks solely to the purpose of the statute and whether it would prevent a plaintiff making money from a contract to do such an illegal act.

97 Except in very two limited circumstances, as explained in Part II.

98 See also Weinrib, ‘Illegality as a Tort Law Defence’, above n 5, 40–3.

with such an inquiry is that criminal statutes are frequently (if not always) silent on the question of civil liability in tort. Take, for example, the criminal statute examined in *Miller v Miller*, which at the relevant time provided:

371A. Special case: Motor vehicles

(1) A person who unlawfully —

- (a) uses a motor vehicle; or
- (b) takes a motor vehicle for the purposes of using it; or
- (c) drives or otherwise assumes control of a motor vehicle,

without the consent of the owner or the person in charge of that motor vehicle, is said to steal that motor vehicle.⁹⁹

The legislature's silence on the question of civil liability suggests that it either did not have such an issue in mind at the time of drafting, or purposefully omitted to consider it. Despite this however, the High Court implied a legislative intent to *negate a duty of care*. It did so by, firstly, deducing that the 'purpose of the statute is to deter and punish individuals using a vehicle in circumstances that often lead to reckless driving'.¹⁰⁰ This is clearly the correct purpose of the criminal law. However, the court then reasoned that it is implicit within such a purpose that the legislature intended that where a plaintiff and a defendant are complicit in a crime of illegally using a motor vehicle, such a plaintiff is to be denied a duty of care by that defendant to drive safely. As stated by the majority:

The statutory purpose of a law proscribing dangerous or reckless driving is *not* consistent with one offender owing a co-offender a duty to take reasonable care... The inconsistency or incongruity arises regardless of whether reckless or dangerous driving eventuates. It arises from the recognition that the purpose of *the statute is to deter and punish* using a vehicle in circumstances that often lead to reckless and dangerous driving.¹⁰¹

If we return to the statute extracted above, however, it seems artificial to reason that the legislature intended for s 371A of the *Criminal Code Act Compilation Act 1913* (WA) to operate in tort law.¹⁰² Yet the High Court replaced the usual tort law principles with the imputed purpose of the criminal statute, and presumed that the legislature resolved to do this. As has been identified by numerous authors,¹⁰³ such reasoning represents an act of judicial legislation. Indeed, at the commencement of their reasoning, the majority judges themselves queried the utility of this search for statutory purpose; concerned that such an exercise would be a smokescreen for judges giving

⁹⁹ *Criminal Code Act Compilation Act 1913* (WA) s 371A.

¹⁰⁰ *Miller v Miller* (2011) 242 CLR 446, 481–2 [101].

¹⁰¹ *Ibid.*

¹⁰² As was said in J Theobald, *The Interpretation of Statutes by the late Sir Peter Benson Maxwell* (4th ed, Sweet and Maxwell, 1905) at 122: 'It is in the largest degree improbable that the Legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness'. This observation was approved of by the High Court in *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J) and has since been more recently applied in *McElwaine v Owners — Strata Plan 75975* (2017) 18 BPR 37,207, 37,208 [2] (Basten JA), 37,220 [66]–[67] (White JA).

¹⁰³ Erbacher, *Negligence and Illegality*, above n 26, 128–9; McLachlin, above n 5, 217; Fleming, *The Law of Torts*, above n 26, 139.

‘effect to their own ideas of policy’.¹⁰⁴ Nevertheless, the approach ultimately endorsed by the High Court simply allows judges to stipulate whether or not a claim is contrary to a criminal statute without having to consider *any* relevant policy factors other than the relevant statutory purpose.¹⁰⁵

An unfortunate consequence of this reasoning is that the application of the illegality defence now disturbs the principles and policies of tort. In this judgment, the High Court reasons that a duty to drive with reasonable care between two co-offenders is inconsistent with the purpose of the statute, as upholding such a duty would not punish or deter Danelle from illegally using the stolen vehicle.¹⁰⁶ As a result, the criminal law’s purpose to deter and punish offenders is effectively imported into the law of tort and any recognition of the principles of tort law — that it is a body of law which aims to compensate plaintiffs where they have suffered loss due to the *fault* of a defendant,¹⁰⁷ or to do corrective justice between the parties,¹⁰⁸ or to place justified moral responsibility upon defendants when their actions fall below the standard expected of society¹⁰⁹ — are all but forgotten. Thus, Australia’s application of the illegality defence undermines the elemental goals of tort law.

(b) Element 2: An artificial denial of the duty of care

In *Miller v Miller* the High Court held that a plaintiff’s illegality is not to be considered a ‘traditional defence’ but rather a ‘salient feature’¹¹⁰ central in determining whether the defendant owes the plaintiff a duty of care.¹¹¹ The central problem with this conception is that it presumes that illegality is only relevant at the duty of care stage. As previously stated, the court gave no reasons for why a plaintiff’s illegality should be solely understood through the lens of a duty of care nor did it articulate the advantages of such an approach.

In the context of *Miller v Miller*, there was an established duty that could

104 *Miller v Miller* (2011) 242 CLR 446, 459–60 [29] citing *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397, 405.

105 Such as the seriousness of the plaintiff’s illegality, the relative culpability of the plaintiff compared to that of the defendant, whether it would be proportionate to deny compensation, or the policy that a duty of care is owed to all persons, not those who have not committed illegal actions (we are not in a court of equity). As we will see below, all of these factors are relevant to the UK’s illegality defence.

106 *Miller v Miller* (2011) 242 CLR 446, 481–2 [101].

107 See Joel Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton University Press, 1970) 212–21; Martin Stone, ‘On the Idea of Private Law’ (1996) 9 *Canadian Journal of Law and Jurisprudence* 235, 249. See also generally Peter Cane, *The Anatomy of Tort Law* (Hart Publishing, 1997) ch 1; Glanville Williams, ‘The Aims of the Law of Tort’ (1951) 4 *Current Legal Problems* 137.

108 See Ernest Weinrib, *The Idea of Private Law* (Harvard University Press, 1995) 4–5; Allan Beever, *Rediscovering the Law of Negligence* (Hart Publishing, 2007) 3–19; Jules Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford University Press, 2001) 5–6.

109 See Peter Cane, ‘Retribution, Proportionality and Moral Luck in Tort Law’ in Peter Cane and Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (Clarendon Press, 1998) 141, 148; Izhak England, *The Philosophy of Tort Law* (Dartmouth Publishing, 1993) 8–10.

110 Albeit an overriding one.

111 *Miller v Miller* (2011) 242 CLR 446, 454 [13].

have readily applied: the duty owed by a driver to a passenger to drive with reasonable care.¹¹² Nevertheless, the court found that to uphold such a duty in the circumstances of the case would be incongruous with the purpose of s 307A of the *Criminal Code Act Compilation Act 1913* (WA). A major deficiency in this conclusion, however, is that if Maurin was deemed to owe a duty of care to Danelle to drive safely, it would have no bearing on the relevant statutory purpose. The authorities could still use the criminal law to find Danelle guilty of the offence proscribed by s 371A, and thus achieve the purposes of punishment and deterrence. Furthermore, upholding such a duty would arguably *enhance* the purpose of the statute, as it would require the defendant to drive with reasonable care and therefore promote road safety (albeit from within a stolen vehicle).¹¹³ Thus, the High Court's reasoning was seemingly artificial in the sense that it established inconsistency between tort law and the criminal law even though upholding such a duty would likely enhance the purpose of the statute. Furthermore, it is arguable that in most cases there will be no incongruity between criminal law and tort law because a duty of care in tort law will rarely undermine the authorities' ability to separately prosecute a plaintiff in order to achieve a criminal statute's purpose. It is our contention that the High Court's duty-based analysis is therefore misguided, as it is devoid of an understanding that the simultaneous operation of two areas of law to achieve multiple and distinct purposes is demonstrative of a coherent legal system.

C Application of the analytical framework to the duty-based approach

With the above critical examination in mind, this section will now apply the analytical legal coherence framework, developed in Part II, to Australia's conception of the illegality defence:

- (i) The test adopted undertakes a form of doctrinal transplantation by ensuring that the formulations of the illegality defence are identical across contract law, the law of trusts and tort law. In adopting an indistinguishable test that solely focuses upon the statute that the plaintiff has infringed, the analysis that informs whether the defence should be applied inadequately values the distinctive principles and policies of each area of the common law.
- (ii) The primary focus of the test on ascertaining the purpose of the relevant criminal statute means that tort laws' longstanding principles and policies are given insufficient consideration.
- (iii) The application of the defence is arguably irrational and unreasonable. Its unreasonability stems from the fact that it disingenuously holds that Parliament intended for a criminal statute to alter the general principles of tort law. It then uses this assumption to come to the somewhat illogical conclusion that there will be an inconsistency between a duty of care in tort law and the criminal law.

¹¹² See *Imbree v McNeilly* (2008) 236 CLR 510.

¹¹³ If we follow the court's line of reasoning, it can also be said that if defendant drivers do not owe a duty of care to their criminal confederate passengers, they are more likely to act recklessly and endanger the public. This therefore undermines the purpose of the statute.

- (iv) The above analysis demonstrates that Australia's conception of the illegality defence is seemingly based on legal consistency, rather than legal coherence. Not only is the formulation of the illegality defence adopted such that it is consistent with the other laws of obligations, but the application of the defence also replaces goals of tort law with the purpose of the criminal statute.

While the simplicity of the Australian conception of the illegality defence appears, at first glance, to inject clarity into a historically chaotic principle of law, such simplicity elides a nuanced distinction between legal consistency and legal coherence. As a result, it is our contention that Australia's illegality defence in tort may risk undermining the very purpose for which it was established.

IV The illegality defence in Canada and the UK: A comparative analysis

In light of the foregoing deficiencies in the Australian formulation of the illegality defence, this Part will examine the alternative conceptions of the defence adopted by: (A) the Canadian Supreme Court in *Hall v Hebert*,¹¹⁴ and (B) the UKSC in *Patel v Mirza*.¹¹⁵ As stated in Part I, in contrast to the position articulated in *Miller v Miller*, the respective approaches to the illegality defence adopted within these comparable common law jurisdictions have received significant scholarly support. As such, this Part will analyse the reasoning and approach articulated in the leading decisions of Canada and the UK.

A The Canadian approach

1 The facts and decision of *Hall v Hebert*

In July 1986, the defendant Hebert, and the plaintiff Hall, drove home from a party. Hebert drove the car, given that Hall had consumed approximately eight beers. During the drive home, however, the pair stopped halfway to share a further six beers. At 3 am, they continued driving until they hit a gravel road that was so rough that the car keys fell out of the ignition. They could not find the keys, so they decided to start the car via a 'rolling start' down a hill. Hall asked if he could drive, to which Hebert replied 'sure ok'. The roll start was attempted and Hall lost control. The car left the road, fell down a sheer slope and Hall suffered significant head injuries. Hall later sued Hebert, alleging that he was negligent in giving Hall permission to drive the car. Counsel for Hebert alleged that as Hall was driving while intoxicated, he was acting illegally and therefore the illegality defence should apply to negate his claim.

A majority in the Canadian Supreme Court found that Hall was contributorily negligent, and as a result liability was to be apportioned between the parties. However, the majority further held that the fact that Hall was acting illegally at the time the tort was committed should not prevent him from recovering compensation. Providing the leading judgment, McLachlin J propounded:

¹¹⁴ [1993] 2 SR 159.

¹¹⁵ [2017] AC 467.

[The defence] is justified where allowing the plaintiff's claim would introduce inconsistency into the fabric of the law, whether by permitting the plaintiff to profit from an illegal or wrongful act, or to evade a penalty prescribed by criminal law. Its use is not justified where the plaintiff's claim is merely for compensation for personal injuries sustained as a consequence of the negligence of the defendant.¹¹⁶

Thus, in its landmark decision the Canadian Supreme Court adopted a rule-based approach to the illegality defence, which holds that except in the above two circumstances,¹¹⁷ the illegality defence in tort should not operate as a bar to an award of compensation.¹¹⁸ It is this test, and the court's justification of it, that will now be critically examined.

2 A critical examination of the rule-based approach

The Canadian approach conceptualises illegality as a traditional defence, frustrating an otherwise complete cause of action, as opposed to a defence that negates the duty of care element in negligence. At the time *Hall v Hebert* was decided, however, the Canadian Supreme Court was yet to formulate a test for the illegality defence in the specific context of negligence.¹¹⁹ As such, it had to decide the way in which the defence should be framed and 'in what circumstances and under what doctrinal rubric courts may prevent a plaintiff from recovering compensation in tort'¹²⁰ on the grounds of illegality. To aid in this task, the court considered various Australian,¹²¹ English,¹²² and American¹²³ precedents, which at the time were relatively undeveloped. Notably, when considering whether to adopt the duty-based approach, McLachlin J labelled it a 'draconian power'¹²⁴ that undermines the entire foundation of the tort of negligence itself:

Donoghue v Stevenson, the source of our modern law of negligence and of the concept of duty upon which it is founded, requires that a person exercise reasonable care toward all his or her neighbours. It does not say that the duty is owed only to

116 *Hall v Hebert* [1993] 2 SCR 159, 179–80 (McLachlin J with whom La Forest, L'Heureux-Dubé and Iacobucci JJ agreed).

117 The first situation has been described as a 'shifting sanction action': see James Goudkamp, 'Can Tort Law be Used to Deflect the Impact of Criminal Sanctions? The Role of the Illegality Defence' (2006) 14 *Torts Law Journal* 20, 28. It occurs when a plaintiff attempts to use tort law to deflect the impact of a sanction imposed on her by the criminal law. As an example of the second situation, the illegality defence will bar a plaintiff from receiving exemplary damages because they are not compensatory in nature, and from recovering lost wages when the plaintiff's employment income derives from criminal activity: see McLachlin, above n 5, 213.

118 It must be understood that the reference to 'profit' is limited: a plaintiff will only be said to profit where they seek exemplary damages or damages for loss of income where that income was based on profiting from criminal actions. As said by McLachlin J, 'Compensation for something other than wrongdoing, such as for personal injury, would not amount to profit in this sense': *Hall v Hebert* [1993] 2 SCR 159, 172.

119 *Ibid* 171–2.

120 *Ibid* 169.

121 McLachlin J cited *Smith v Jenkins* (1970) 119 CLR 397, *Gala v Preston* (1991) 172 CLR 243: *ibid* 171.

122 McLachlin J cited *Lane v Holloway* [1968] 1 QB 379, *Pitts v Hunt* [1991] 1 QB 24, *Burns v Edman* [1970] 2 QB 541: *ibid* 171, 175.

123 McLachlin J cited *Katco v Briney*, 183 NW 2d 657 (Iowa, 1971), *Harper v Grassie* 150 P 1175 (Wash, 1915): *ibid* 175–6.

124 *Hall v Hebert* [1993] 2 SCR 159, 169–70.

neighbours who have acted morally and legally. Tort, unlike equity which requires that the plaintiff come with clean hands, does not require a plaintiff to have a certain moral character in order to bring an action before the court. The duty of care is owed to all persons who may reasonably be foreseen to be injured by the negligent conduct.¹²⁵

Following this statement, McLachlin J went on to reason that the illegality defence in tort must take into account tort law's unique principles and policies, and must be conceptualised as a traditional defence that, when made out, negates the cause of action.¹²⁶

The benefit of this formulation, as has been demonstrated by numerous authors,¹²⁷ is that by constructing an illegality defence in tort that takes into account different considerations from those contemplated in contract or equity, the defence is better attuned to those principles and policies of tort law that exist to achieve corrective justice between the parties,¹²⁸ while also avoiding legally incoherent outcomes. At the heart of this rule-based approach are the two identified circumstances (or 'exceptions') in which the defence of illegality must operate.¹²⁹ Importantly, however, cases falling within these exceptions are distinguished from a plaintiff merely seeking compensatory damages. As explained by McLachlin J, the defence must operate to exempt liability in these exceptional cases because doing otherwise would enable tort law to undermine the criminal law and create incoherence in the law.¹³⁰ Therefore, the Canadian Supreme Court specifically identified the factual matrices in which incoherence will arise between tort law and the criminal law, and clearly formulated a rule-based defence that guards against these circumstances.¹³¹ By restricting the operation of the defence in this way, the court was mindful to respect the principle that tort law must achieve corrective justice between the parties; the illegality defence is not applicable simply where a plaintiff, although engaged in illegal conduct, merely seeks to be compensated for their loss due to a defendant's tort. Thus, in formulating an illegality defence that is specific to tort law, the defence is nuanced and satisfactorily aligns with its underlying rationale: to preserve coherence, as opposed to mere consistency, in the law.¹³²

¹²⁵ Ibid 182.

¹²⁶ Ibid.

¹²⁷ Weinrib, 'Illegality as a Tort Law Defence', above n 5, 50–1; McLachlin, above n 5, 215; Goudkamp, 'Self Defence and Illegality under the Civil Liability Act 2002 (NSW)', above n 12, 68–9.

¹²⁸ Beverley McLachlin, writing extra-judicially, has identified this: see McLachlin, above n 5, 220–2.

¹²⁹ See above n 116.

¹³⁰ McLachlin J explained that to allow recovery in these cases would put the courts in the position of saying that the same conduct is both legal, in the sense of being capable of rectification by the court, and illegal: see *Hall v Hebert* [1993] 2 SCR 159, 176 (McLachlin J).

¹³¹ Ernest Weinrib predicted this when he outlined the conception of the defence in his article, 'Illegality as a Tort Law Defence', above n 5, 50–1.

¹³² Moreover, in recognising that a plaintiff's illegality is a concern that is independent from the duty of care analysis, a court must firstly hold that a defendant has been negligent before the illegality defence will apply. Then, if it is necessary for the defence to apply, a court will find that the defendant's responsibility is only discharged because of a concern that the law will otherwise become incoherent: *Hall v Hebert* [1993] 2 SCR 159, 181–2. Thus, tort law's

Nevertheless, it is the rule-based nature of this approach, largely premised upon curtailing judicial discretion, which constitutes a major shortcoming in the Canadian approach. As has already been discussed in the analysis of legal coherence in Part II, each of the various principles and policies of the common law must be considered when determining whether the illegality defence should be applied. This is because they are relevant to whether the outcome in tort will be coherent with the broader legal system.¹³³ However, the Canadian conception only identifies two circumstances in which compensation in tort law will conflict with the criminal law. As a result, no attention is paid to the outcomes that would occur in the other branches of the law of obligations, such as contract law or unjust enrichment. It is therefore possible that the defence will not be applied where an outcome in tort is incoherent with another branch of the law of obligations.¹³⁴

3 Application of the analytical framework to the rule-based approach

- (i) The Canadian defence is premised on applying in two circumstances where it has been identified that an outcome in tort would be incoherent with the criminal law. This means that the underlying principles and policies of other areas of law, and the possibility that an outcome in tort could conflict with another branch within the law of obligations, are ignored. Thus, the analysis that informs whether the defence should be applied does not value the distinctive policies of each area of the common law, other than those of tort and criminal law.
- (iii) The Canadian Supreme Court devised an illegality defence that is specifically unique to the law of torts. Thus, tort law principles — in particular the foundational concept of duty in negligence as laid out in *Donoghue v Stevenson*¹³⁵ — are given adequate weight.
- (iii) The defence admits of two exceptions, which are premised upon a sophisticated understanding of the difference between a legally incoherent outcome and allowing a plaintiff to be compensated for loss. For this reason, its application is particularly intelligible.

longstanding principle of publicly labelling defendants as negligent where they are at fault is still upheld, while the application of the defence reasonably and intelligibly demonstrates to society that although the defendant has committed a civil wrong responsibility must be absolved to preserve coherence within the legal system.

¹³³ See Part II.

¹³⁴ Take a hypothetical example where the principles of tort and contract intersect: A suffers consequential economic loss when B negligently weighs and sells to A 0.1 g of methamphetamine for personal use, believing it to be 1 g. A will not be able to sue in contract, given the principle that a court will not enforce a contract for illegal services. If however, A chooses to sue in tort, under the Canadian approach the illegality defence will not apply, as the fact scenario does not fit into any of the two exceptions: A is not profiting from her actions, nor is she trying to deflect the impact of a criminal sanction. Thus, a court will be restricted from taking into account the fact that contract law prevents the enforcement of such a contract and therefore A's successful outcome in tort may lead to incoherence.

¹³⁵ [1932] UKHL 100.

- (iv) The rule-based nature of the defence leaves limited discretion for courts or individual judges to unjustifiably strip plaintiffs of their private rights in tort. Such a denial of discretion implicitly recognises that the creation of legal coherence is sometimes outweighed by the need to prevent judges from denying plaintiffs otherwise justified compensation.¹³⁶

In sum, the rule-based Canadian approach means that *when the illegality defence applies*, it is certain to create legal coherence between criminal law and tort law. Furthermore, given that it is devised to apply in tort specifically, it is better able to value the principles and policies of tort and therefore ensure that this body of law is legally coherent. Although it is limited due to the fact that its consideration of legal coherence does not extend to the entirety of the law of obligations, it is arguable that the Canadian conception is a sophisticated and nuanced defence.

B The UK approach

1 The facts and decision of *Patel v Mirza*

Patel (the plaintiff) transferred £620,000 to Mirza (the defendant), pursuant to an agreement that Mirza would use the money to bet on the movement of shares, on the basis of insider information that he would receive from a certain contact. However, Mirza did not end up receiving the insider information and the betting did not take place. When Patel asked for the funds to be returned, Mirza refused. As a result, Patel brought a claim in unjust enrichment, seeking recovery of the funds. Counsel for Mirza argued that as the agreement between the parties amounted to a conspiracy to commit an offence of insider dealing,¹³⁷ the illegality defence applied.

A majority in the UKSC held that while the illegality defence applied in contract law to prevent Patel from reclaiming his funds, it did not apply in the law of unjust enrichment, and thus Patel's claim was upheld. On behalf of the majority, Lord Toulson JSC held that legal coherence is the underlying rationale for the illegality defence¹³⁸ and propounded that when applying the defence, it is necessary to:

- a) consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim;
- b) consider any other relevant public policy on which the denial of the claim may have an impact and;
- c) consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts.¹³⁹

Lord Toulson JSC therefore established a three-step test, which is said to structure the discretion given to courts in assessing whether a plaintiff's

¹³⁶ *Hall v Hebert* [1993] 2 SCR 159, 175–6.

¹³⁷ See the *Criminal Justice Act 1993* (UK) s 52.

¹³⁸ Although he instead used the words 'harmful to the integrity of the legal system': *Patel v Mirza* [2017] AC 467, 504 [120] (Lord Toulson JSC, with whom Baroness Hale DPSC, Lord Kerr, Lord Wilson and Lord Hodge JJSC agreed).

¹³⁹ *Ibid* 504–5 [120].

illegality should preclude an award of compensation.¹⁴⁰ It has been held that this discretionary test applies across *all four branches of the law of obligations*,¹⁴¹ and therefore it is essential that the test be critically examined in order to scrutinise its operation in the context of tort law.

2 A critical examination of the discretionary-based approach

What characterises the UK's defence is that it is explicitly premised upon giving judges a broad discretion to consider a wide variety of policy factors relevant to whether the illegality defence should be applied.¹⁴² As proponents of the discretionary approach have argued,¹⁴³ this is the test's primary advantage, as it enables a court to take into account *all of the factors*, including the distinctive policies and principles of each area of law, that appear relevant in determining whether a particular award of compensation in tort will be legally coherent.¹⁴⁴

By way of demonstration, when the majority applied this test to the facts of the case, it firstly took into account the policy underlying the criminal statute, stating that the 'relevance of taking into account the purpose of the relevant prohibition is self-evident'.¹⁴⁵ Rather than concentrating solely on this matter, however, the majority proceeded to take into account other relevant policy factors, including the policy which made the contract between Patel and Mirza illegal,¹⁴⁶ the policy of unjust enrichment law,¹⁴⁷ and the overall integrity and harmony of the law.¹⁴⁸ It then considered whether Patel's claim in unjust enrichment would stultify any of these purposes.¹⁴⁹ Following this

140 However, Lord Toulson JSC also acknowledged that within this framework an unlimited number of factors may be relevant, including 'the seriousness of the conduct ... and whether it was intentional or whether there was a marked disparity in the parties' respective conduct': *ibid* 501 [507].

141 See *Tchenguiz v Grant Thornton UK LLP* [2016] EWHC 3727 (Comm); *McHugh v Okai-Koi* [2017] EWHC 710 (QB); *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd* [2017] EWHC 257 (Ch). See also James Goudkamp, 'Does Patel v Mirza Apply in Tort?' (2017) (July/August) *Personal Injury Law Journal* 1.

142 Lord Toulson JSC held that when assessing whether the defence should apply, many factors may be relevant and that setting a prescriptive or definitive list would be unhelpful given the infinite possible variety of cases: *Patel v Mirza* [2017] AC 467, 501 [107].

143 See Burrows, above n 4, 61, 67; Ernest Lim, 'Tensions in Private Law Judicial Decision-Making: A Case Study on the Illegality Defence' (2016) 4 *Journal of Business Law* 325, 328–9; Lord Grabiner QC, 'Illegality and Restitution Explained by the Supreme Court' (Speech delivered at the Distinguished Law Lecture, Queens' College, Cambridge, 19 October 2016) 9–10; Paul Davies, 'The Illegality Defence and Public Policy' (2009) 125 *Law Quarterly Review* 556, 560; Nicholas Strauss, 'Ex Turpi Causa Oritur Actio?' (2016) 132 *Law Quarterly Review* 236, 265.

144 Burrows asserts that this is superior to a rule-based approach because, 'illegality in the law of obligations involves so many variables that the normal formulation of rules is problematic': see Burrows, above n 4, 56.

145 *Patel v Mirza* [2017] AC 467, 503 [115].

146 *Ibid* 503 [115].

147 *Ibid* 501 [108].

148 *Ibid*.

149 Lord Toulson held that (*ibid* 505 [121]):

A claimant, such as Mr Patel, who satisfies the ordinary requirements of a claim for unjust enrichment, should not be debarred from enforcing his claim by reason only of the fact that the money which he seeks to recover was paid for an unlawful purpose. There

consideration of the pertinent ‘range of factors’, the majority ultimately concluded that there was no logical basis requiring Patel to forfeit his funds, as such a result would otherwise unreasonably limit the application of unjust enrichment.¹⁵⁰ This reasoning reveals that, in taking into account the purposes of contract, unjust enrichment and criminal law, the UKSC was able to arrive at the intelligible and reasonable conclusion that no incoherence would arise in the circumstances of this case. Thus, the UK discretionary approach is advantageous in the sense that it has the *capacity* to promote a sophisticated level of legal coherence.

Nevertheless, such extensive judicial discretion has also attracted scholarly criticism¹⁵¹ on the basis that it allows judges to lose sight of the centrality of legal coherence as the most justifiable reason for defeating legal rights on account of a plaintiff’s illegality. The proportionality limb of the test reflects this criticism. Lord Toulson JSC held in *Patel v Mirza* that it is central to consider whether the denial of the claim would be a proportionate response to the illegality, because ‘it enables the court to avoid inflicting loss on the claimant disproportionate to the measure of his badness’.¹⁵² His Lordship then reasoned that an unlimited number of factors are relevant to this limb.¹⁵³

An illegality defence that is premised upon legal coherence, yet requires a court to also consider whether the outcome is proportionate to the illegality in question, is arguably flawed. This is because, as identified by Erbacher,¹⁵⁴ proportionality is irrelevant to assessing whether an outcome will undermine legal coherence. As was explained in Part II, the illegality defence should not be applied to punish plaintiffs for their criminal actions, as they will have already been punished, or have the capacity to be punished in a justified and reasonable manner, by the criminal law.¹⁵⁵ It follows that irrespective of how serious the illegality is, if a plaintiff is simply seeking compensation for their *loss* due to a defendant’s negligence, this will never have an adverse effect on the application of the criminal law and, for this reason, the illegality defence

may be rare cases where for some particular reason the enforcement of such a claim might be regarded as undermining the integrity of the justice system, but there are no such circumstances in this case.

¹⁵⁰ Ibid 503–4 [115]–[119].

¹⁵¹ See James Goudkamp, ‘The End of an Era? Illegality in Private Law in the Supreme Court’ (2017) 133 *Law Quarterly Review* 14, 17–18; Law and Ong, above n 48, 892; Graham Virgo, ‘Patel v Mirza: one step forward and two steps back’ (2016) 22 *Trusts & Trustees* 1090, 1094; Erbacher, ‘Another Misstep in Negligence and Illegality’, above n 2, 1061, 1080, 1084; Erbacher, *Negligence and Illegality*, above n 26, 60. Critics have argued that the UK approach is unfavourable because it creates uncertainty in the law. Since the test requires a court to weigh incommensurable factors, it is extremely difficult for a court to come to a rational decision that can be followed by later courts or predicted by legal advisers.

¹⁵² *Patel v Mirza* [2017] AC 467, 545 [262] (Lord Sumption JSC referring to Lord Toulson JSC’s reasoning).

¹⁵³ Including ‘the seriousness of the conduct ... and whether it was intentional or whether there was a marked disparity in the parties’ respective conduct’: ibid 501 [107] (Lord Toulson JSC).

¹⁵⁴ Erbacher, ‘Another Misstep in Negligence and Illegality’, above n 2, 1073–4.

¹⁵⁵ And if they have not, tort law is an inappropriate mechanism to do punishment. It is for the realm of criminal law to do this: McLachlin, above n 5, 212; Goudkamp, ‘Self Defence and Illegality under the Civil Liability Act 2002 (NSW)’, above n 12, 67–8; Ford, above n 38, 185; Virgo, above n 38, 188; Gibson, above n 38, 91.

should *never* apply in these circumstances¹⁵⁶ As such, the proportionality limb of the defence allows a court to take into account many factors that are *irrelevant* to legal coherence, and in the words of Lord Sumption JSC in the minority, 'leave a great deal to a judge's visceral reaction to particular facts'.¹⁵⁷

3 Application of the analytical framework to the discretionary-based approach

- (i) The UK's illegality defence is identical across all four branches of the law of obligations.¹⁵⁸ However, because it is premised upon wide judicial discretion, the analysis that informs whether the defence should apply is able to properly value the distinctive principles and policies that underpin each area of the common law.
- (ii) The test enables the principles and policies of tort law to be taken into account. However, the extent of the weight that they are given will vary greatly depending upon each individual judge or court. Thus, it is uncertain whether tort law's foundational principles will be properly considered in each decision.
- (iii) The application of the defence has the capacity to produce reasonable and intelligible outcomes, as was demonstrated in *Patel v Mirza*. However, given that proportionality is a central consideration, it is just as likely that the application of the defence will be arbitrary and unreasonable on the basis that proportionality is irrelevant to the rationale of legal coherence.
- (iv) While discretionary, the approach appears to favour rigid legal consistency because its proportionality limb dominantly persuades courts to give effect to the criminal law's purpose. When a plaintiff has committed a very serious offence, UK courts will likely reason that as the criminality of the offence is proportionate to the injury suffered, the illegality defence should be applied. Thus, the plaintiff will be punished a second time, even if they have already been (or could in the future be) subjected to punishment for contravening the criminal law. The result is that tort law simply mirrors the criminal law's purpose to punish and therefore achieves flawed legal consistency.

In sum, the UK's illegality defence can be praised for its ability to take into account the distinctive purposes and principles of each area of law. Nevertheless, the proportionality limb of the discretionary approach

¹⁵⁶ Conversely, irrespective of how minor the illegality is, if the plaintiff is seeking to deflect a sanction imposed by the criminal law, by using tort law, then the illegality defence *must* be applied to achieve legal coherence.

¹⁵⁷ *Patel v Mirza* [2017] AC 467, 546 [263] (Lord Sumption JSC with whom Lord Clarke JSC agreed).

¹⁵⁸ Although see *Henderson v Dorset Healthcare University NHS Foundation Trust* [2018] 3 WLR 1651, 1673 where the English Court of Appeal suggested that a different formulation to that adopted in *Patel v Mirza* may apply in some types of tort cases.

unacceptably allows individual judges to contemplate a number of irrelevant factors that may operate to strip plaintiffs of otherwise justified compensation.¹⁵⁹

C Preliminary conclusion

This article has now outlined and critically evaluated the three distinctive conceptions of the illegality defence used by Australia, Canada and the UK. By deploying the analytical legal coherence framework, we can draw the following preliminary conclusion:

1. The duty-based illegality defence adopted in Australia problematically promotes legal consistency, in place of coherence.
2. The rule-based illegality defence adopted in Canada promotes sophisticated and nuanced reasoning, which aims to preserve legal coherence, with the exception that it may fail to account for any incoherence that arises when the law of torts comes into conflict with another law of obligation (rather than the criminal law).
3. The discretionary-based illegality defence adopted in the UK has the *capacity* to produce an even greater level of legal coherence. However, its overarching proportionality limb is unsatisfactory, as it means the defence can be used to unjustifiably punish plaintiffs a second time. While it is accepted that the alternative rule-based approach may fail to apply in justified circumstances, a rule-based test is more sophisticated than open-ended discretion because *when the defence applies*, it is certain to create legal coherence.¹⁶⁰

Based on these preliminary findings, it is desirable for Australia to question its duty-based approach and consider reconceptualising the illegality defence in light of the formulation adopted by the Canadian Supreme Court in *Hall v Hebert*.

V A case study investigation

Given that Australia's illegality defence has been the subject of little scrutiny, this final Part will examine the likely outcome rendered by the *Miller v Miller* defence in response to the facts of a previously decided case. It will then briefly compare this hypothesised result to the likely outcomes rendered by the rule-based and discretionary-based approaches.

159 This was recognised by Lord Sumption JSC in dissent: *Patel v Mirza* [2017] AC 467, 545 [262].

160 For further evidence of this conclusion, see the Canadian cases that have since applied *Hall v Hebert*: *Blackwater v Plint* [2005] 3 SCR 3; *Ingles v Tutkaluk Construction Ltd* [2000] 1 SCR 298; *Stewart v Pettie* [1995] 1 SCR 131; *British Columbia Ltd v Canada* [1993] 3 SCR 804. See especially *British Columbia v Zastowny* [2008] 1 SCR 27. As was said by McLachlin J when considering whether such a discretionary approach should be adopted (*Hall v Hebert* [1993] 2 SCR 159, 171):

I fear that unless placed upon a firm doctrinal foundation and made subject to clear limits, this general power to invalidate actions on grounds of public policy might prove more problematic than has the troubled doctrine of *ex turpi causa non oritur action*. We would be trading one label for another without coming to grips with the fundamental problem.

A Joyce v O'Brien

The facts used for the first case study analysis are those of *Joyce v O'Brien*;¹⁶¹ a UK case decided before the test for illegality was clarified in *Patel v Mirza*. The claimant in this case, Joyce, was the nephew of the defendant, O'Brien, and they had decided to steal some ladders from a building site. The parties drove to the site in O'Brien's van. Joyce got out, stole the ladders, and placed them in the rear of the van. Due to their length, the ladders protruded from the van and its back doors had to be left open. As such, Joyce decided to stay in the back of the van and hold the ladders in place. As O'Brien drove off, he drove around a corner at excessive speed and Joyce was consequently thrown out of the van and suffered serious head injuries, including brain damage. Joyce and O'Brien were later charged and convicted of larceny.¹⁶² Afterwards, Joyce sued O'Brien in negligence, claiming compensation for his injuries. Counsel for O'Brien argued, however,¹⁶³ that since the parties had engaged in a joint criminal enterprise to commit larceny, the illegality defence should apply to exempt their liability in negligence.

1 The outcome according to the Australian duty-based approach

If Joyce were to bring his claim in NSW, the illegality defence outlined in s 54 of the *Civil Liability Act 2002* (NSW) would not apply, as O'Brien's negligent conduct constituted an offence. That is, he was engaged in a joint criminal enterprise to commit the offence of larceny under s 117 of the *Crimes Act 1900* (NSW) ('CA') at the time the tort occurred.¹⁶⁴ Therefore, a court would need to turn to the common law in considering whether the illegality defence should operate as a bar to compensation.

Pursuant to the approach endorsed in *Miller v Miller*, the court should first ascertain the purpose of s 117 of the CA in order to determine whether it would be incongruous with this purpose for a court to uphold a duty of care in the law of negligence.¹⁶⁵ Section 117 states: 'Whosoever commits larceny, or any felony by this Act made punishable like larceny, shall, except in the cases hereinafter otherwise provided for, be liable to penal servitude for five years.'

However, since neither the CA nor its explanatory memorandum provide a definition of the word 'larceny', the purpose of this section can only be identified by considering the *common law* definition of larceny. As was established by the High Court in *Ilich v The Queen*:

At common law, larceny is committed by a person who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and

¹⁶¹ [2014] 1 WLR 70.

¹⁶² See the *Theft Act 1968* (UK) ss 1, 7.

¹⁶³ The second defendant was the relevant insurance company who would be liable for the payment of compensation.

¹⁶⁴ *Civil Liability Act 2002* (NSW) s 54(2). See also the relevant discussion of the scope of this provision in Part I of this article at above n 8.

¹⁶⁵ The relevant duty of care would be the established duty that a driver owes to their passenger to drive with reasonable care: *Imbree v McNeilly* (2008) 236 CLR 510.

carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof ...¹⁶⁶

It follows from this definition that the purpose of s 117 is to protect and uphold the right to exclusive possession, by punishing and deterring those who dishonestly acquire property.¹⁶⁷ If we employ the reasoning adopted in *Miller v Miller*, it is likely that erecting a duty of care in tort law to drive with reasonable care would undermine this purpose in circumstances where such driving enabled the plaintiff to steal the ladders. This is because the duty of care is so inextricably linked to the crime that to uphold it would stultify the legislature's intention to punish and deter those who commit larceny.¹⁶⁸ Thus, the expected outcome of the Australian duty-based approach will be that the defence applies to deny Joyce a duty of care and, consequently, any compensation for his injuries.

There are two noteworthy observations that can be made following this brief case study. The first is that the finding of inconsistency between the criminal law, on the one hand, and the established duty to drive with reasonable care, on the other, is disingenuous. Since Joyce and O'Brien were convicted of the offence of larceny, they had already been punished by the criminal law. Therefore, to reason that upholding a duty of care would be inconsistent with the purpose of s 117 of the CA is artificial,¹⁶⁹ in the sense that such a duty would not undermine the criminal penalties already imposed on the parties. Even if Joyce were to be compensated for his injuries in tort, his criminal sentence would not be altered and, for this reason, his remedy in tort would have no bearing on the criminal law's purpose.¹⁷⁰ The reasoning that denies Joyce a duty of care is founded upon a rigid understanding of

166 *Ilich v The Queen* (1987) 162 CLR 110, 123 (Wilson and Dawson JJ).

167 See, eg, Edward Griew, 'Dishonesty: The Objections to Feely and Ghosh' [1985] *Criminal Law Review* 341, 342–4; Andrew Simester and Robert Sullivan, 'On the Nature and Rationale of Property Offences' in R Duff and Stuart Green (eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (Oxford University Press, 2005) 169, 173–83; George Fletcher, 'The Metamorphosis of Larceny' (1976) 89 *Harvard Law Review* 469, 472–4. See generally David Ormerod and David Williams, *Smith's Law of Theft* (Oxford University Press, 9th ed, 2007) ch 1.

168 This absurd outcome is analogous to the outcome in *Miller v Miller*, where it was held that a duty to drive with reasonable care should not be upheld to a passenger as it would be inconsistent with the legislature's purpose to punish and deter dangerous driving: *Miller v Miller* (2011) 242 CLR 446, 481–2 [101].

169 What further contributes to this artificiality is that s 117 is totally reliant on the common law's interpretation of the word 'larceny', as no definition is provided in the *Crimes Act 1900* (NSW). Thus, to reason that the legislature intended for the purpose of this offence to negate a duty of care in negligence, means that the common law must also have such an intention. The problem with such a conclusion is that when larceny was created as an offence by the common law, the modern tort of negligence (as formulated by the English courts) was not yet recognised in Australia — Australia did not endorse the modern approach to negligence until the High Court decision in 1933 in *Australian Knitting Mills Ltd v Grant* (1933) 50 CLR 387. Furthermore, even if it was said that the legislature's enactment of the offence in s 117 carried a different intention from that of the common law, s 117 of the *Crimes Act 1900* (NSW) was originally enacted in 1900. Again, this was long before the concept of a duty of care in the tort of negligence was established and therefore it is certain that at the time of drafting, the legislature did not have any such intention in mind.

170 Note that even if the criminal law had not been used to punish Joyce, tort law will still not conflict with the criminal law: the criminal law can still be used to punish Joyce after he is awarded compensatory damages in tort.

in/consistency and therefore fails to grasp the simultaneous and coherent operation of both tort law and criminal law in this context.

A second, and perhaps more crucial, observation from the anticipated outcome of this case is that Australia's duty-based approach may lead to injustice. Joyce had already been punished by the criminal law. By denying his claim in tort, the Australian approach subjects the claimant to a form of callous and unjustified double punishment. Moreover, such a punishment is irrational as it is determined by the level of injury caused by the tort as opposed to a measured decision based on the plaintiff's relative culpability in accordance with sentencing principles.¹⁷¹ Even though Joyce had committed the comparatively minor crime of stealing ladders, the application of the illegality defence now means that he is being subjected to the additional punishment of having to pay life-long medical expenses associated with his serious injury. This case study indicates that Australia's formulation of the illegality defence can provoke unjust outcomes and fail to give effect to the central purposes and policies of tort law, particularly that of proper compensation.

2 The outcome according to the Canadian rule-based approach

If this case were decided through the lens of the Canadian rule-based approach, the courts would first determine whether O'Brien had been negligent before considering whether the defence of illegality should apply to exempt his liability. Presuming that each of the elements of negligence can be satisfied, the operation of the Canadian illegality rule is relatively simple because Joyce's case does not fall within either of the two applicable exceptions. That is, Joyce is not profiting from his illegal actions,¹⁷² nor is he trying to use tort law to deflect the imposition of his criminal sanction.¹⁷³ As such, it is likely that the defence will not apply and Joyce will be entitled to *compensatory* damages for his loss.¹⁷⁴

The anticipated outcome of the Canadian approach demonstrates that the rule-based illegality defence is able to appreciate the simultaneous operation of the criminal law and tort law. The defence does not apply in the circumstances of this case because its two exceptions are capable of grasping the central distinction that exists between a plaintiff seeking compensation for loss suffered, and a genuine stultification of the criminal law.¹⁷⁵ Thus, in

171 Goudkamp, 'The Defence of Joint Illegal Enterprise', above n 45, 442. See also Erbacher, *Negligence and Illegality*, above n 26, 39–42.

172 As long as he claims only compensatory, and not exemplary, damages.

173 Joyce is merely seeking compensation for his injuries, rather than suing O'Brien for the cost of the penalty imposed on him by the criminal law. This case is unlike *British Columbia v Zastowny* [2008] 1 SCR 27, where the Canadian Supreme Court held that a plaintiff who sought to be compensated in tort law for periods of unemployment due to justified incarceration by the criminal law, would be profiting from his criminal conduct.

174 However, it is important to note here that the defence of voluntary assumption of risk or the partial defence of contribution negligence may still apply.

175 That is, by compensating Joyce in response to O'Brien's infringement of his private rights the court will uphold key tort law principles and policies, which aim to compensate plaintiffs whose private rights have been infringed upon due to the fault of another, and achieve corrective justice between the parties. At the same time, however, Joyce will have already

addition to promoting nuanced legal coherence, the rule-based approach ensures that plaintiffs are not unjustifiably stripped of the right to compensation in tort law where their private rights have been unduly violated. The narrow application of the Canadian approach reflects McLachlin J's concern that the private rights of plaintiffs should be fiercely protected even if this results in incoherence.¹⁷⁶ In addition, it attenuates the concerns of coherence scholars, such as Amaya, who warn that the ruthless pursuit of legal coherence will unduly impede the incremental development of the law and reproduce circular and conservative outcomes.¹⁷⁷

Thus, the Canadian formulation of the defence can ultimately be praised for identifying that, while legal coherence underscores the existence of the illegality defence in tort, coherence should not be mercilessly pursued to the extent of stripping plaintiffs of their long-standing civil rights without adequate justification.

3 The outcome according to the UK discretionary-based approach

Although it does not specifically outline such an approach, the defence adopted in the UK seems to require a court to firstly determine whether O'Brien was negligent pursuant to the elements of the relevant cause of action, before considering whether the illegality defence will operate.¹⁷⁸ In respect of the latter consideration, the three-step test endorsed in *Patel v Mirza* compels the court to firstly examine the underlying purpose of the statute in question; relevantly, ss 1 and 7 of the *Theft Act 1968* (UK). The purpose of these sections is to protect and uphold the individual right to exclusive possession of property, by punishing and deterring those who dishonestly acquire property.¹⁷⁹ Nevertheless, the weight that should be attributed to the purpose of the statute, and whether it would in fact undermine Joyce's right to be compensated in tort law, is unclear.

According to the second step of the test, the court is then encouraged to take into account the relevant policy factors involved. This will likely include the policies of tort law and, in particular the policy that tort law aims to provide fair compensation and achieve corrective justice between the parties. Finally, the third step of the test will consider whether the denial of the claim would be a proportionate response to Joyce's illegality. Given that Joyce has committed the relatively minor crime of theft (albeit intentionally), denying him compensation for the severe injury he sustained would arguably be an

been punished by the criminal law through a finding of guilt. Thus, the purposes of the criminal law are also satisfied via the imposition of a criminal sentence.

176 *Hall v Hebert* [1993] 2 SCR 159, 177, 179–80 (McLachlin J).

177 Amaya, above n 63, 474. See also Goudkamp and Mayr, above n 31, 243.

178 In all of the cases in which the illegality defence propounded in *Patel v Mirza* has been applied in tort law, the defence is considered after the relevant cause of action is made out: see, eg, *Stoffel & Co v Grondona* [2018] EWCA Civ 2031 (13 September 2018); *Clark v Farley* [2018] EWHC 1007 (QB) (2 May 2018); *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd* [2017] EWHC 257 (Ch). Although it should be noted that in *Henderson v Dorset Healthcare University NHS Foundation Trust* [2018] EWCA Civ 1841 the English Court of Appeal considered only the law on the illegality defence.

179 Which is identical to the *Crimes Act 1900* (NSW) s 117. For further analysis of this see above n 166.

unjust and disproportionate response to the illegality.

The reasoning undertaken in line with Lord Toulson JSC's guided discretionary test, demonstrates that the UK approach is nuanced and sophisticated in the sense that it has the capacity to take into account various factors relevant to whether the illegality defence should be applied. Nevertheless, such reasoning now requires the purposes and policies of criminal law, which favour the operation of the illegality defence in this fact scenario, to be weighed against the purposes and policies of tort law as well as the outcome of the proportionality limb, which militate in favour of providing Joyce with an award of compensation. This dilemma reflects the primary criticism levelled towards the UK's discretionary approach: it involves balancing multifarious factors without providing a common metric against which a reasonable and justified determination can be made. In the circumstances of this case study, it is uncertain which factors ought to prevail and the final decision will ultimately be left to the subjective discretion of the court.

Thus, while the UK approach has the capacity to consistently promote legal coherence, its open-ended discretion creates problematic uncertainty.

Overall assessment

The practical application of the three conceptions of the illegality defence to the facts of *Joyce v O'Brien* elucidates the unjust nature of Australia's duty-based approach. Not only does the conceptual basis of the approach fail to support the underlying rationale of legal coherence; its practical application in the context of tort law may render callous outcomes. Furthermore, on the basis of the observations made in this case study, it can be argued that a rule-based (as opposed to discretionary-based) approach encourages objective decision-making and certainty in the law, whilst preserving the private rights of plaintiffs in justified circumstances.

VI Conclusion

The analysis undertaken in this article was prompted not only in response to the deficient attention devoted to examining the common law illegality defence utilised in Australian tort law. It was also motivated by a concern that, while current tort law scholarship identifies legal coherence as the primary rationale for the illegality defence, the literature fails to satisfactorily clarify the parameters of this criterion. To this end, this article sought to elucidate the meaning of legal coherence in the context of illegality and, in doing so, formulate a framework for a legal coherence analysis of the various conceptions of the illegality defence propounded in the jurisdictions of Australia, Canada and the UK.

In light of the findings of this article, it is clear that the *Miller v Miller* formulation of the illegality defence should be questioned. Not only is this approach underpinned by the pursuit of legal consistency and justified by reasoning akin to judicial legislation, it also promotes outcomes that unjustifiably strip plaintiffs of their private right to be awarded compensation. It follows that Australian superior courts should consider reformulating the illegality defence utilised in the general law of torts, and they should do so with the guidance provided by the Canadian Supreme Court in *Hall v Hebert*.

The foregoing analysis indicates that the rule-based approach steers the most acceptable 'middle course' between the conflicting claims that underpin an appeal to the defence of illegality.¹⁸⁰

Nevertheless, irrespective of the approach adopted, it is our contention that any reformulation of Australia's illegality defence *must* be founded upon a reasoned and nuanced understanding of 'legal coherence', as proposed by the analytical framework articulated in this article. The *Miller v Miller* articulation is problematic in its apparent failure to understand the distinction between legal consistency and legal coherence. As a result, the duty-based defence operates by simply substituting the purposes of tort law with those of the criminal law. The concern, of course, is that criminal law is exclusively focused upon offenders and whether the actus reus and mens rea of a crime have been committed. The interests of the victim play a very minor role in an assessment of guilt and a determination of sentence. On the other hand, tort law is a two-sided affair, in which the 'victim' of tortious interference institutes proceedings and the court is concerned with correcting and balancing the interests of both the plaintiff and the defendant.

Consequently, if the purpose of the criminal law is artificially transposed in tort law, the very foundation of tort law's justificatory basis as a law of obligation, which balances and corrects the interests of *both* parties, is disturbed. It is for this reason that any reformulation of the defence *must* be based on a sophisticated and nuanced understanding of legal coherence.

180 As expressed by Bingham LJ in *Saunders v Edwards* [1987] 1 WLR 1116, 1134.